SUPREME COURT, U. S.

IN THE

JAN 15 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 19....

No. 1019

ROBERT EUGENE FRANKLIN,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

NO. 24203

ROBERT EUGENE FRANKLIN)
Petitioner)
)
vs.)
)
UNITED STATES OF AMERICA)
Respondent)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

On the 25th day of October, 1966, Petitioner was indicted by the Federal Grand Jury of the

Middle District of Georgia for the offense of perjury in violation of Title 18, USC Sec. 1621. The Appellant plead not guilty to the indictment (R-5).

During the charge to the jury the Court referred to the religious and ecclesiastical history of the administration of justice (R-242, 243). Verbatim excerpts from the Books of Genesis and Revelations were read from a Gideon Bible by the Court (R-243, 244, 245). The Court then related its personal experiences concerning the taking of oaths on the east coast of China (R-246, 247), followed by a reference to the Mohammedan religion and the Koran.

On October 28, 1966, the trial jury returned a verdict of guilty as charged (R-272) whereupon the Court sentenced your Petitioner to confinement in the Federal penitentiary for a period of three years (R-274). Petitioner filed notice of appeal to the United States Court of Appeals for the Fifth Circuit on October 28, 1966, (R-277), wherein the following specifications of errors were enumerated, among others:

1. The Court erred in affirming the District Court's direct reading from a Gideon Bible during its charge to the jury.

2. The Court erred in affirming the District Court's relating its personal experiences concerning the taking of oaths in court proceedings on the east coast of China during its charge to the jury.

3. The Court erred in affirming the District Court's referring to the procedure of administering oaths in the Mohammedan religion, and referring to the Koran.

On appeal the decision and sentence of the

lower court were affirmed. Immediately thereafter, Petitioner petitioned for a re-hearing which was denied on November 17, 1967. An application for an extension of time within which to file a petition for writ of certiorari was granted by Mr. Justice William J. Brennan, Jr. on December 18, 1967.

II.

JURISDICTIONAL STATEMENT

The statutory provision believed to sustain the jurisdiction of this Court, is Section 1254 (1), Title 18, of the U. S. Code.

The date of the judgment sought to be reviewed by certiorari is October 23, 1967, and the date of this application for certiorari is January 8, 1968. There is no official report to date.

III.

The questions herein presented are:

(1) Whether or not the Court erred in affirming the District Court's charge to the jury in which it read excerpts from the Holy Bible?

(2) Whether or not the Court erred in affirming the District Court's charge to the jury in which it related certain personal experiences concerning witness oaths in court proceedings on the east coast of China?

(3) Whether or not the Court erred in

affirming the District Court's charge to the jury wherein it referred to the Mohammed Religion and the Koran.

IV.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The decision of the Court of Appeals for the Fifth Circuit as to the propriety of charging the jury with excerpts from the Bible along with other matters of religious import, by holding that said charge did not constitute reversible error, so far departs from the accepted and usual course of judicial proceedings or so far sanctions such a departure by a lower court as to call for an exercise of this court's power of supervision.

Certiorari should be granted to determine whether the Court can incorporate in its charge excerpts from the Books of Genesis and Revelations as quoted from a Gideon Bible, and whether the Court can instruct the jury concerning its persona experiences with, and knowledge of, certain religi aspects concerning the sanctity and taking of oaths.

At the close of the evidence the Court, in prefacing its instructions to the jury, reminded the jurors of their sworn duty to apply and follow the law as it would be given them by the Court (R-226,227). Such a statement would have a sobering effect on twelve conscientious jurors and ready them to accept blindly whatever the Court instructed regardless of whether each agreed with the instructions or believe them to be so. It is during this obligatory receptive atmosphere that

the Court expounded at length on the historical implications of religious influence on our modern trial and the taking of oaths by witnesses (R-242, .243). So as to emphasize and illustrate the religious overtones, the Court leafed through the Gideon Bible and instructed the law by reading verbatim excerpts from Genesis of the Old Testament, and then Revelations of the New Testament (R-244,245). What if a juror did not accept the teachings of the Old Testament? What if a juror because of his Jewish background rejects the New Testament? Are both such jurors duty-bound because of their sworn duty as a juror to accept unequivocally the Court's instruction! Could the Court in its biblical diversions have instructed the jury to "extract an eye for an eye and a tooth for a tooth"? Is this the law!

The Court further departed from its objective judicial role by relating its personal experiences concerning the administration of justice and the taking of oaths on the east coast of China. Once again it was emphasized that such practice was based on religious principles [". . . and it was interesting to me that all of them have a religious background, religious touch to them" (R-246, 247)].

As though in an effort to install emphatically definite religious connections concerning oaths, the Court concludes on an international note ["So, I give you this observation as an example that it is not only true in this country, but it is true generally throughout the civilized world. . ." (R-248)]

Petitioner questions the accuracy of the trial judge's instruction concerning the enactment of legislation outlawing perjury. ["Now, that is the reason, since the ecclesiastical influence

is no longer prevalent in our courts, the church no longer administers our courts, that's the reason that the Congress of the United States has seen fit to put this criminal statute in the books as part of the law of the land which we observe, so that if persons violate the sacred oath which they take, that they may be punished by the judicial process. Now, that's the theory and that's the background for the taking of an oath; that's the reason Congress has decided to make it a felony for persons to swear falsely in this Court; and that is the statute which the Congress has enacted pursuant to the historical influence of religious ceremony." (R-245, 246)]. Once again it is blatantly obvious that the jury was being besieged with religious coercion by the Court.

It is submitted that such legislative intent was to insure that courts and juries dispensed justice based on facts and truth instead of on lies and untruths. And that to fulfill that end, perjury was outlawed and designated a felony so as to discourage the tampering with justice.

Regardless, however, of the legislative intent, it is submitted that such an instruction on the law is but a missile in the Court's barrage of the jury, seeking to arouse each juror's religious convictions and thereby unduly influence his decision.

Were the religious diversions necessary to instruct and enlighten the jurors as to the law governing oaths and perjury? Petitioner urges that such diversions unduly magnified the sanctity on an oath and placed each juror in the dangerous position of having to convict petitioner or reconcile an acquittal with his religious beliefs. Judge Sibley, in a case concerning remarks made by the trial judge during instructions to the jury, said, "No juror should be induced to agree to a verdict by a fear that a failure so to agree will be regarded by the public as reflecting upon either his intelligence or his integrity.

Personal considerations should not influence his conclusions; and the thought of them should never be presented to him as a motive for action." Kesley v. United States, 1931, 47 F.2d 453, 454. It logically follows that no juror should be induced to reach a verdict of guilty by a fear that a failure to do so would reflect on his religious beliefs. "The presiding judge at the trial should not, by any biased or prejudiced language, influence the jury in their determination of the facts." Starr v. United States, 153 U.S. 614; 14 S.Ct. 919. Petitioner submits that the recurring religious overtones unnecessarily charged amounts to coercion by the Court.

Further, petitioner urges that the Court's persistent reference to the Bible was manifestly contrary to the numerous decisions by this Honorable Court concerning the separation of Church and State. (Chamberlain v. Dade County Board of Public Instruction, 377 U.S. 402, 84 S.Ct. 1272, Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679).

V.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record and of all proceedings of the Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 24203, ROBERT EUGENE FRANKLIN, Appellant v. USA, Appellee, to

the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this Honorable Court, and for such further relief as to this Court may seem proper.

Dated January 8, 1968.

P. WALTER JONES

JERRY W. BRIMBERRY

Attorneys for Petitioner

APPENDIX A

ARGUMENT AND SUBMISSION

Extract from the Minutes of September 28, 1967

ROBERT EUGENE FRANKLIN

No. 24203 versus

UNITED STATES OF AMERICA

On this day this cause was called, and after argument by James W. Smith, Esq., and Harold Lambert, Esq., for appellant, and Tyrus R. Atkinson, Jr., Assistant U.S. Attorney for appellee, was submitted to the Court.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 24203

ROBERT EUGENE FRANKLIN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court for the Middle District of Georgia.

(October 23,1967.)

Before TUTTLE, GEWIN and AINSWORTH, Circuit Judges.

GEWIN, Circuit Judge: The appellant, Robert Eugene Franklin, was found guilty of perjury in violation of Title 18 U.S.C. §1621 in the United States District Court for the Middle District of

Georgia. He was sentenced to a term of three years. On this appeal he contends that the court committed error in denying his motion for continuance; that the proper venue for his trial was the Albany Division and not the Macon Division of the Middle District where he was tried; a directed verdict should have been granted; the court erred in deciding as a matter of law that the testimony was material; and the court's charge was improper. We affirm.

The charge of perjury arose out of the trial of another defendant who was charged with a violation of federal liquor tax statutes. In that trial the appellant was called as a witness. Before he was called as a witness it was claimed that he had executed a sworn statement in the presence of two alcohol and tobacco tax agents who were preparing the evidence for the trial in the liquor case. While on the witness stand the sworn statement was shown to the appellant, but he denied that he gave the statement and denied that he had said anything contained therein. He claimed that he signed a blank piece of paper at the request of the agents and that all of the statements contained therein were inserted by the agents after he signed the blank piece of paper.

The motion for continuance is based upon the fact that the perjury indictment was returned on October 25, 1966, and trial was commenced on October 27, 1966. When the motion for the continuance was made the facts with respect to the charges were fully developed under the direction of the district court. On September 12, 1966, the appellant was sent a letter by the United States Attorney and in the letter was enclosed the form of a proposed information stating the charges against him and advising

him that the United States intended to proceed by information but would seek to obtain an indictment if requested by the appellant. At arraignment on September 23, 1966, appellant was represented by his privately retained counsel and a copy of the proposed information was delivered to counsel at that time. The district court made inquiry as to whether the charges in the proposed information and the charges contained in the indictment were substantially the same and it developed that such charges were identical. It was further shown that prior to the arraignment counsel for appellant had been informed of the charges and so stated to the court. On or before September 26, 1966, appellant's counsel requested a copy of the testimony from the trial out of which the perjury charge arose. During the month of October there was correspondence between appellant's counsel and the U. S. Attorney's office which revealed the date and place the case would be called for trial if an indictment was returned. The record clearly disclosed that the appellant was aware of the charges in excess of 45 days before the trial and that his attorney was aware of such charges and was actively preparing a defense at least 30 days before trial. We are unable to conclude there was any abuse of discretion in denying appellant's motion for continuance. Avery v. Alabama, 308 U.S. 44 (1940); United States v. Redwitz, 328 F.2d 395, 398 (6 Cir. 1964).

The appellant claims that the 1966 amendment to Rule 18 of the Federal Rules of Criminal Procedure is unconstitutional in that it provides that the prosecution shall be had in a district in which the

offense was committed.[1] An accused has a constitutional right to a trial by jury in the district where the crime shall have been committed. Art. III, § 2, Cl. 3, U.S. Const.; U.S. Const. Amend. 6. There is no constitutional guaranty that the accused had the right to a trial in the division of the district in which the offense was committed. See United States v. Cores, 356 U.S. 405 (1958); United States v.Anderson, 328 U.S. 699 (1946); Lafoon v. United States, 250 F.2d 958 (5 Cir. 1958).

A review of the record clearly convinces us that the court was correct in denying appellant's motion for a directed verdict. There was ample evidence to support the charge if the jury believed such evidence.

We have carefully examined the court's charge in the light of all of the evidence presented and the arguments and contentions of counsel, and we are convinced that no error was committed in the court's instructions to the jury.

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1 Rule 18, amended February 28, 1966, effective July 1, 1966, provides as follows:

"Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses." (Emphasis added)

Prior to the amendment the rule stated:

"but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed"

Upon a careful review of all of the contentions of the appellant we have concluded that he received a fair trial.

The judgment is AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1967

No. 24203

D.C. Docket No. CR. No. 3039

ROBERT EUGENE FRANKLIN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE, GEWIN and AINSWORTH, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered

and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 23, 1967

Issued as Mandate: NOV 27 1967

APPENDIX D

IN THE
UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 24203

ROBERT EUGENE FRANKLIN,

Appellant

versus

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court for the Middle District of Georgia

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PETITION FOR REHEARING

JAMES W. SMITH, ESQ.,
HAROLD LAMBERT, ESQ.,

326 W. Water Street,
Bainbridge, Georgia

Attorneys for Appellant

U.S. COURT OF APPEALS
(FILED: NOV 8 1967

EDWARD W. WADSWORTH
CLERK

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 24203

ROBERT EUGENE FRANKLIN,

APPELLANT,

versus

UNITED STATES OF AMERICA,

APPELLEE.

PETITION FOR REHEARING

Comes now the Appellant, pursuant to Rule 29 of the Rules of the United States Court of Appeals for the Fifth Circuit and brings his Petition for Rehearing on the opinion rendered on October 23, 1967, in this cause, upon the following grounds:

(1) The Court failed to consider adequately the main objection relied upon by Appellant in paragraph 5 of the Specifications of Errors in that the Court refused to pass upon the question of whether or not the Court erred in instructing the jury by reading from the Holy Bible. In the charge to the jury, the Court did not give due consideration to the effect of charging from the Holy Bible for a considerable length of time, leaving with the jury the impression that for them to acquit the Appellant would be to undertake the teachings of the Lord which placed in their minds that this man was guilty not only under the laws of the United States, but under the laws of God. It is contended by Appellant that the Court

failed to consider adequately the effect of such a charge by Judge Elliott in arriving at their decision in affirming the case of the Appellant. Since this matter had not been previously passed upon by any of the Appellate Courts as to whether or not a judge has a right to use the Holy Bible in his charge, this type of case should be carefully considered by the Court.

(2) The Court failed to consider adequately and erred in its conclusion that there was no abuse in not granting a continuance to the Appellant simply because of the fact that the proposed information furnished him on September 23, 1966, was substantially the same and that it developed that such charges were identical. It further showed that prior to the arraignment, counsel had been informed of the charges. Appellant respectfully submits that whether or not it was the same, the forcing of Appellant to go to trial in such a short time after an indictment was returned, was an abuse of his constitutional right, for it left no opportunity to study the indictment and to at least have an opportunity to examine the jury list and ascertain something about the jury list. It is the contention of Appellant that no lawyer should be forced to trial in this short period of time without an opportunity of investigating the jurors who are to serve on his case and to pass judgment upon him, and it is respectfully submitted that no lawyer can conscientiously represent a client without having sufficient time not only to examine and study the indictment, but to have an opportunity to study the jury list.

(3) The Court failed to consider adequately and erred in its conclusion that the materiality of the statement made by Appellant was material

to the issue in the former case upon which he testified and upon which the prosecution for perjury was based.

Appellant respectfully suggests, pursuant to Rule 25(a) of this Court, that the foregoing is of sufficient importance to warrant a rehearing by the entire Court en Banc.

Respectfully submitted,

SMITH, GARDNER, WIGGINS & GEER

BY: /s/ James W. Smith
JAMES W. SMITH
302 Flint Street
P.O. Box 1085
Albany, Georgia - 31702

/s/ Harold Lambert
HAROLD LAMBERT
326 W.Water Street
Bainbridge, Georgia - 31717

Attorneys for Appellant

CERTIFICATE OF COUNSEL

The undersigned does hereby certify that this Petition for Rehearing is presented in good faith and in the interests of justice, and not for the purpose of delay.

SMITH, GARDNER, WIGGINS & GEER

By:/s/ James W. Smith
JAMES W. SMITH

/s/ Harold Lambert
HAROLD LAMBERT

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing Petition for Rehearing was furnished by mail to Floyd M. Buford, Esquire, United States Attorney, Macon, Georgia, this 7th day of November, 1967.

SMITH, GARDNER, WIGGINS & GEER

By:/s/ James W. Smith
JAMES W. SMITH

APPENDIX E

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 24203

ROBERT EUGENE FRANKLIN,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee.

U.S.COURT OF APPEALS
FILED NOV 17 1967

EDWARD W. WADWORTH, CLERK

Appeal from the United States District Court for the Middle District of Georgia

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(November 17 , 1967)

ON PETITION FOR REHEARING

Before TUTTLE, GEWIN and AINSWORTH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

NO. 24203

ROBERT EUGENE FRANKLIN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

U.S.COURT OF APPEALS FILED DEC 14 1967 EDWARD W. WADSWORTH CLERK

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE, GEWIN & AINSWORTH, Circuit Judges.

O R D E R:-

ON CONSIDERATION of the Motion of appellant for recall and stay of judgment issued as mandate in the above entitled and numbered cause,

IT IS ORDERED that said Motion be, and it is hereby GRANTED.

APPENDIX G

SUPREME COURT OF THE UNITED STATES

NO.----------, October Term, 1967

ROBERT EUGENE FRANKLIN,

Petitioner,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 16, 1968.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 18
day of December, 1967.

CLERK'S CERTIFICATE
UNITED STATES OF AMERICA
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.

I, Edward W.Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing pages numbered from 283 to 298 contain a full, true and complete copy of the following papers: Argument and Submission; Opinion of the Court; Judgment; Petition for Rehearing; Order Denying Rehearing; and Order Granting Appellant Recall & Stay of Mandate to 1/13/68; in a certain cause in said Court numbered 24203 wherein Robert Eugene Franklin is appellant, and United States of America is appellee; as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the multilith record numbered from 1 to 282 is the multilith record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit this 15th day of December, A.D., 1967.

EDWARD W. WADSWORTH
Clerk of the United States Court
of Appeals for the Fifth Circuit.

By s/ Jackie Esposito
Deputy Clerk

(SEAL)